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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN RUIZ,

Defendant and Appellant.

E046896

(Super.Ct.No. FWV702122)

**OPINION**

APPEAL from the Superior Court of San Bernardino County. Katrina West,  
Judge. Affirmed.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Gary W. Schons, Assistant Attorney General, and Steve Oetting and  
Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, a jury found defendant guilty of burglary (Pen. Code, § 459)<sup>1</sup> (count 2) and two counts of assault with a firearm (§ 245, subd. (a)(2)) (counts 3 and 4).<sup>2</sup> The jury also found true that defendant had personally used a firearm (§ 12022.5, subd. (a)) in the commission of counts 2, 3, and 4 and that defendant had personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)) in the commission of count 3. Defendant was sentenced to a total term of 22 years in state prison: the upper term of six years on count 2, plus an additional term of 10 years for the firearm use enhancement attached to count 2; a consecutive one-year term (one-third the three-year midterm) for count 3, plus a consecutive term of one year four months (one-third the four-year midterm) for the firearm use enhancement attached to that count, and an additional term of one year four months (one-third the four-year midterm) for the great bodily injury enhancement attached to that count; and a consecutive one-year term for count 4, plus an additional one year four months (one-third the four-year midterm) for the firearm use enhancement attached to that count.

Defendant's sole contention on appeal is that the trial court erred when it imposed one of the assault convictions consecutive to the burglary offense. We reject this contention and affirm the judgment.

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<sup>1</sup> All future statutory references are to the Penal Code unless otherwise stated.

<sup>2</sup> The jury acquitted defendant of counts 1 (attempted murder (§§ 664/187, subd. (a)), 5, and 6 (two counts of making criminal threats (§ 422)).

# I

## FACTUAL BACKGROUND

Defendant and Elsy Zelaya lived together for about 12 years and had a child together. Zelaya had two children from a previous relationship who also resided with them. Zelaya was a truck driver and worked with a man named Michael Tittle. At some point, Zelaya and Tittle became romantically involved.

In 2007, Zelaya left defendant and moved in with her brother. In a telephone conversation a few days prior to August 27, 2007, defendant told Zelaya that someone wanted to kill her. Zelaya thereafter began carrying a handgun she had purchased six years earlier.

On August 27, 2007, about 3:45 a.m., Zelaya arrived at Tittle's apartment, as they were planning to ride to work together. While Tittle took out the trash, Zelaya waited in a bedroom. When Tittle returned, Zelaya began to get ready for work, going into the bathroom to apply makeup.

As Tittle walked from the bedroom to the kitchen, he saw the front door to his apartment open. Defendant was standing in the doorway. Defendant and Tittle saw each other, and defendant grabbed a handgun from his waistband and cocked it. Tittle went after defendant and unsuccessfully tried to take the handgun away. During the struggle, the two men ended up in the hallway near the bedroom, with defendant pointing the gun at the back of Tittle's head.

When Zelaya saw what was occurring, she retrieved her handgun from her purse and loaded it. She then came out of the bathroom, concealing the handgun behind her, and had a conversation with defendant. She tried to calm defendant down, but he said he was going to kill her, Tittle, and her brother. A short time later, fearing he was going to shoot Tittle, Zelaya fired at defendant multiple times. Defendant returned fire with his handgun. Zelaya was hit in the chest and hip areas, causing her to sustain serious injuries. When defendant ran out of bullets, Tittle jumped on him and, with the help of a neighbor, held him down until the police arrived.

A search of defendant's truck revealed a box and a plastic baggie containing multiple rounds of nine-millimeter ammunition. From Tittle's apartment, officers recovered Zelaya's .380 semiautomatic handgun and defendant's nine-millimeter semiautomatic handgun. They also recovered four expended .380-millimeter casings and nine expended nine-millimeter casings. In defendant's back pocket, officers found a loaded magazine for a nine-millimeter handgun.

After defendant waived his constitutional rights, he gave the police varying explanations of why he had taken the gun to Tittle's apartment. First, he stated that he had taken it intending only to scare Tittle. Later, he said that he had gone to kill Tittle. He then asserted that he was only trying to scare Tittle by discharging the gun into the air. Finally, he claimed that he had gone to the apartment to kill himself in front of Zelaya.

Defendant testified on his own behalf at trial and claimed that when he suspected Zelaya of cheating on him, he drove to Tittle's apartment to talk to her. He admitted

entered Tittle's unlocked apartment uninvited. He acknowledged that he had pulled his gun out but claimed he did so because he was afraid of Tittle. He claimed that he and Tittle began fighting and that during the fight the gun accidentally discharged. Defendant further asserted that Tittle had assaulted him several times while he was on the ground, that he had never pointed his gun at either Tittle or Zelaya, and that he had never intended to injure either one of them.

Defendant denied that he had previously followed either Tittle or Zelaya to the apartment. He also denied that he was angry at Zelaya for leaving him. He admitted that he had ordered Tittle to get down on his knees but claimed it was so he would not hurt Tittle. Defendant did not recall stating he was going to kill Tittle and then Zelaya.

## II

### DISCUSSION

Defendant contends the trial court erred when it imposed consecutive terms on the burglary conviction and both the assault with a firearm convictions in violation of section 654. The People essentially argue that substantial evidence supported the trial court's determination that (1) the intended felony required for the burglary was the making of criminal threats, and (2) defendant did not form the intent to assault the two victims until after he entered the apartment. We agree with the People.

Section 654, subdivision (a) provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case

shall the act or omission be punished under more than one provision.” It precludes multiple punishments not only for a single act, but also for an indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294.)

Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the actor. If all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives that were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Centers* (1999) 73 Cal.App.4th 84, 98.) Section 654 does not prohibit separate punishment for “gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense.” (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 191.)

The principal inquiry in each case is whether the defendant’s criminal intent and objective were single or multiple. Each case must be determined on its own facts. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) Where the trial court does not make an express finding, an implied finding that the crimes were divisible inheres in the judgment and must be upheld if supported by the evidence. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.)

Whether the defendant entertained multiple criminal objectives is a question of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them. (*People v. Coleman* (1989) 48 Cal.3d 112, 162; *People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) “In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

In the present matter, defendant readily concedes that section 654 does not prohibit separate punishment “for a single criminal transaction where crimes of violence were committed against different persons.” (*People v. Bauer* (1969) 1 Cal.3d 368, 377.) Separate punishment for both the assault convictions in this case comports with the underlying purpose of the multiple-victim exception imposing punishment commensurate with culpability. Since defendant committed a crime of violence against more than one person, he bears greater culpability. (*Neal v. State of California* (1960) 55 Cal.2d 11, 20.) The issue thus is only whether defendant harbored separate criminal intents when he committed the burglary and the assaults on the victims.

Defendant contends that the events leading up to his assault on the victims provide no evidentiary support for the trial court’s implied finding of separate objectives for the illegal entry and the assaults. He also argues that his statements to police that he intended

to scare or kill the victims, coupled with his entry into Tittle's apartment with a loaded gun, leave no room for a finding other than that the burglary conviction and the assaults were incidental to a single criminal objective: to assault Tittle and/or Zelaya with the gun. Furthermore, defendant notes that he made four different statements to the police about his intent, including that he intended to kill Tittle. Defendant's own testimony at trial, however, is sufficient to support the trial court's implied finding that he entertained separate criminal intents when he committed the offenses.

Defendant testified that he had entered Tittle's apartment in an attempt to speak with Zelaya about their relationship and the children and that he had not intended to hurt her. He explained that he had taken the gun to Tittle's apartment for protection against Tittle because Tittle was "really big." Once inside the apartment, he told Zelaya in a normal tone of voice that he wanted to talk to her about the children. When he entered the apartment, the gun was "in [his] waist"; he pulled the gun out after Tittle came toward him because he thought Tittle was going to beat him up. He repeatedly denied under oath that his intention in entering the apartment was to hurt either Tittle or Zelaya.

It is true that, after his arrest, defendant gave the police four different explanations as to why he had taken a gun to the apartment. Only one of the stories was that he intended to harm Tittle, however; the others had to do with killing himself or scaring the victims, not assaulting or killing them. We must infer from the trial court's imposition of consecutive sentences that it believed defendant's sworn testimony that he had only intended to scare the victims and disbelieved the lone conflicting, out-of-court statement.



III

DISPOSITION

The judgment is affirmed.

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RICHLI  
J.

We concur:

RAMIREZ  
P.J.

McKINSTER  
J.